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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 28 2003

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 1.17 of the)	
Commission's Rules Concerning Truthful)	GC Docket No. 02-37
Statements to the Commission)	
)	
Amendment of the Commission's Rules)	
Regulations to Adopt Protection of the Due)	
Process Rights and Other Protections of)	
Title III Licensees in Connection With the)	RM- _____
Exercise by the Commission and its Staff of)	
the Commission's Enforcement Powers and)	
Certain Licensing and Regulatory Functions)	

PETITION FOR RECONSIDERATION

James A. Kay, Jr. ("Kay"), by his attorney, and pursuant to Section 405 of the Communications Act, of 1934, as amended, 47 U.S.C. § 405, and Section 1.429 of the Commission's Rules and Regulations, 47 C.F.R. § 1.429, hereby petitions the Commission to reconsider the *Report and Order* in the above-captioned matter (FCC 03-45; released March 10, 2003), in support whereof, the following is respectfully shown:

1. The *Report and Order* was published in the March 28, 2003, issue of the Federal Register. 68 Fed. Reg. 15096-15098 (March 28, 2003). This petition is being tendered within thirty days of such publication pursuant to Sections 1.4(b)(1) and 1.429(d) of the Commission's Rules and Regulations, 47 C.F.R. §§ 1.4(b)(1) & 1.429(d).

Section 1.17 Amendments

2. Without conceding the propriety, validity, or legality of any aspect of the Commission's action, Kay takes particular issue with the Commission's Regulatory Flexibility Certification. The Commission states: "We believe that the rule we adopt today will not have a significant economic impact on a substantial number of small entities." *Report and Order* at

¶ 20. But a mere "belief," no matter how sincere, is hardly a substitute for the bona fide agency

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determination that Congress intended would underlie such a certification. The Commission has based its “belief” on sheer speculation. There is no consideration or analysis of the extent to which compliance with the newly-adopted “reasonableness” standard will impose on regulated additional burdens in terms of due diligence and legal consultation in order to assure compliance. For large businesses with extensive clerical personnel, in-house legal departments, and/or regulatory attorneys and other consultants on retainer, the additional efforts may hardly be noticed. For small businesses, however, even a moderate amount of additional due diligence and legal services can be a significant burden on financial and personnel resources. The statute requires more than mere theoretical speculation and fanciful belief, and the Congressional mandate can be satisfied only by a specific analysis.

Kay’s Rulemaking Petition

3. The Commission also summarily denied a petition for rulemaking that had been filed by Kay (the second matter listed in the caption above).¹ The Commission erroneously states that Kay’s rulemaking petition was filed on March 5, 2003, *Report and Order* at ¶¶ 19, but it was in fact filed three months earlier, on December 4, 2001, nearly two months before release of the *Notice of Proposed Rule Making* in GC Docket No. 02-37.² Departing from the procedure it applies to virtually all other parties who submit such requests, the Commission never issued a public notice of its filing and never assigned it a rulemaking (RM) number. Instead, the Commission ignored it and then attempted to summarily deny it in the *Report and Order*. This is precisely the type of arbitrary and discriminatory treatment that demands the types of due process safeguards called for in Kay’s rulemaking proposal.

¹ The Kay rulemaking petition was not included in the caption of the *Report and Order*, but it was clearly denied therein. *Report and Order* at ¶¶ 19 & 24; 68 Fed. Reg. at 15098, ¶ 12.

² 17 FCC Rcd 3296 (2002). Kay later included a copy of the petition for rulemaking in his April 8, 2002, comments in GC Docket No. 02-37.

4. The Commission fails to provide any reasons or rational for its summary rejection of Kay's request. The Commission's entire analysis of Kay's rulemaking petition is relegated to three short sentences:

We have examined Kay's proposals and find them without merit. Several of Kay's proposals would unduly burden the Commission's investigatory and hearing functions. Other matters are already adequately addressed by existing law and policy.

Report and Order at ¶ 19 (footnote omitted). The Commission does not say how or in what way Kay's proposals lack merit, there is not explanation of how they would be unduly burdensome on the Commission's enforcement functions, and we are left, in any event, to guess which of Kay's proposals would be so burdensome and which "other matters" are already adequately addressed.

5. In offering his proposal, Kay took great care to properly balance the due process rights of licensees with the Commission's enforcement powers and duties. The Commission may well disagree with where Kay strikes that balance, but it must explain its disagreement. Simply spouting forth conclusory statements that Kay has failed in his effort is not helpful to Kay it is not useful to a reviewing Court that will be left to divine what particular problems the Commission had and why it decided as it did. The Commission may believe in good faith that Kay's proposal is without merit or is otherwise imprudent. But simply believing it and even saying it does not make it so. It is incumbent upon the Commission to address each of Kay's specific proposals and set forth the specific reasons why it lacks merit or is otherwise not in the public interest.

WHEREFORE, it is respectfully requested that the Commission reconsider the *Report and Order* in the above-captioned matter (FCC 03-45; released March 10, 2003).

Respectfully submitted on April 28, 2003,

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